PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Korem,* 2017 NSPC 69

Date: 2017-07-11
Docket: 2678714
Registry: Sydney

Between:

Her Majesty the Queen

v.

Nahman Korem

Judge:	The Honourable Judge A. Peter Ross
Heard:	February 9 and 10, March 8 and April 5, 2017, in Sydney, Nova Scotia
Decision:	July 11, 2017
Charge:	s. 334(a) and(b) Criminal Code of Canada
Counsel:	Kathryn Pentz, Q.C., for the Crown Vincent Gillis, Q.C., for the Accused

Summary

After separating from his wife, and amidst ongoing litigation in the Family Division of the Supreme Court, the accused removed most of the contents of the former matrimonial home while the complainant was out of the country. A year previous he had been awarded ownership of the "matrimonial property" in return for assuming debts and liabilities, but it was not clear that the orders delineated which particular chattels fell into that category. The accused was charged with theft on the theory that he had removed, in addition to matrimonial assets, personal belongings of the complainant and items she had acquired after separation. These, according to the complainant, were worth many thousands of dollars.

Pursuant to a Supreme Court Family Division Contempt Order, most (if not all) of the items which had been removed by the accused were returned to the possession of the complainant. The complainant alleged that in addition to being temporarily deprived of much her personal property, other items, including valuable jewelry, were never recovered.

The accused acknowledged taking numerous items from the premises. He denied taking any items which were not recovered under the SCFD order and asserted "colour of right" in regard to those which were.

The court considered the differentiation of matrimonial from non-matrimonial property, as defined by provincial legislation, in the context of a criminal trial. The elements of the offence of theft, the defence of colour of right, and issues of credibility as they concern both complainant and accused were also considered.

The accused was found guilty of theft of a certain few items.

The Charges

[1] The accused is charged that he did, between May 1st and May 9th, 2013, at Big Baddeck, Nova Scotia:

> a. steal numerous personal belongings the property of Lennan MacIsaac, of a value not exceeding five thousand dollars contrary to s. 334(b) of the Criminal Code (herein referred to as count 2)
>
> b. steal personal belongings namely jewelry, furnishings and household items, the property of Iris Kedmi of a value exceeding five thousand dollars contrary to s.334(a) of the Criminal Code (count 3)
>
> c. steal Bee Happy Farm product and equipment, the property of Iris Kedmi, of a value exceeding five thousand dollars contrary to s.334(a) of the Criminal Code (count 4)

[2] Counts 1 and 6 on the Information were withdrawn prior to trial. Court 5, a mischief charge, was dismissed at the close of the Crown's case

Background

[3] These charges arise in the aftermath of a fractious separation and divorce. The accused, Nahman Korem and the complainant, Iris Kedmi were married and living near Baddeck, Nova Scotia. They operated a family business known as the Crown Jewel Resort. They resided across the road from the resort in a house on its own plot of land.

[4] The business came under financial pressures; the marriage began to break down. The accused took up residence in the Resort; the complainant remained in the home. They attempted to keep the business going. Certain assets were used in both the business and the marriage. They shared responsibility for their daughter Danielle.

[5] Differences became disagreements which spawned litigation. There have been multiple proceedings in the Supreme Court Family Division. Both have new companions. Ms. Kedmi has established a relationship with Lennon (Lenny) MacIsaac. The accused has partnered with Dr. Mary Doyle.

Events Leading up to the Charges

[6] In May of 2013, nearly three years after her separation from the accused, Ms. Kedmi took a trip to Israel with Lennon MacIsaac. While they were away, the accused removed most of the contents of the matrimonial home which, since separation, had been occupied by Ms. Kedmi and Danielle. Mr. Korem had been awarded ownership of the matrimonial assets by the Supreme Court Family Division, and he took this opportunity to repossess them. He did not empty the house completely. Mr. Korem says he took only things which were in the home prior to their separation and left anything which was strictly personal to Ms. Kedmi such as her clothing, whenever acquired. Ms. Kedmi alleges he removed many things of a personal nature, and numerous items which she had acquired after separation.

[7] Mr. Korem stored some of what he took in the Resort; some items were stored in Mary Doyle's residence. According to the complainant a number of items, including valuable jewelry, were secreted away elsewhere.

[8] Upon her return Ms. Kedmi was shocked and upset to see what had been done and complained to the RCMP. She and others took photographs of the near-empty premises. She obtained a court order under which the Sheriff was empowered to seize and return all the items to her. The Sheriff, acting on this

Order, seized property from the Resort and the Doyle residence and returned it to Ms. Kedmi.

[9] The accused was charged with theft of Ms. Kedmi's property and theft of items belonging to Mr. MacIsaac which he had left in the residence. The charges encompass items which were taken and later returned by the Sheriff, and also some things which Ms. Kedmi and Mr. MacIsaac say were taken but never recovered.

[10] As to the items returned by the Sheriff, the accused claims that he was entitled to have them and to take them in the way that he did. He asserts colour of right to any matrimonial assets, and pleads mistake of fact regarding any items which may not have been matrimonial assets (however defined). As to the items never recovered, the accused denies taking them, and denies that they were in the home at all.

[11] I will set out here a brief time line of events and then discuss the family law proceedings in more detail:

- August 2010 – separation, which follows marriage counselling during the previous month of July – Ms. Kedmi stays at 992 West Side Baddeck Rd. – the accused moves into the Resort, across the road

- 8 November 2011 – a Family Division Order declares the assets of Crown Jewel Resort to be matrimonial property (Exhibit #16)
- 10 January 2012 (issued July 2012) – a Consent Corollary Relief Order (CRO) (Exhibit #2)
- April 2013 – Ms. Kedmi leaves the country on a trip
- May 1 to 9, 2013 – the accused removes items from the home
- May/June 2013 – Ms. Kedmi files for personal bankruptcy
- June 4, 2013 – Ms. Kedmi brings a "motion to clarify" to the Family Division
- July 10, 2013 – the accused provides a cautioned statement to the RCMP
- August 6, 2013 – Ms. Kedmi files a Statement of Affairs in her personal bankruptcy (Exhibit #1)
- August 27, 2013 – Ms. Kedmi obtains a Contempt Order in Family Division concerning the removal of the matrimonial assets from 992 West Side Baddeck Rd.
- December 9, 2013 – an Information is sworn charging the accused with theft. (The charges were subsequently amended to read as set out above)
- December 18, 2013 – an "Amended Contempt Order" is issued (Exhibit #15)
- January 10, 2014 – Deputies from the local Sheriff's department execute the Contempt Orders

The Subject-Matter of the Charges

[12] Most of the property allegedly stolen was seized, catalogued and photographed by the Sheriff (Ex #'s 7, 8, 14). Some property allegedly stolen is not before the court in this same sense, being items of Ms. Kedmi and Mr. MacIsaac which they say were taken from the house but never recovered.

[13] As regards property of Ms. Kedmi, the Crown indicated at the outset of the proceedings that it would focus its case on items acquired after separation. However, at trial considerable attention was given to things acquired before and during the marriage. Ms. Kedmi spoke about particular items as being hers and hers alone, including a substantial quantity of jewelry.

[14] Ms. Kedmi claims sole interest in anything which she acquired after separation. As well she claims sole interest in various things which she owned before the marriage, certain things she acquired by gift or purchase during the marriage, and things she made (and the tools used to make them) in pursuit of her hobbies during the marriage. While the accused acknowledges that certain things would be her personal property (clothing) he says that many items Ms. Kedmi claims as her own were "brought into" the marriage, used and enjoyed by both spouses. He says they "became a part of my life."

[15] Where items alleged to have been stolen were not recovered, the issue is whether the Crown has proven that such items were in fact taken from the house. The accused denies any knowledge of such, saying they were not in the home and were never among Ms. Kedmi's possessions.

[16] From the inventory of catalogued items, both Ms. Kedmi and Dr. Doyle claim ownership of certain objects. These claims are mutually exclusive. If I am left with any reasonable doubt about Ms. Kedmi's claim of ownership, a charge of theft cannot be sustained. With respect to the remainder of the catalogued items, things which the accused admits to removing, the issue is whether the accused had a colour of right in the subject property. This includes the question of whether they were acquired by Ms. Kedmi after separation.

The Court Orders - entitlement to the assets

[17] An Order made in the Family Division on 8 November 2011 declares that "The assets of the business Crown Jewel Resort Ranch Inc. are matrimonial property pursuant to the Matrimonial Property Act." To the Order is appended a list of things which Ms. Kedmi is to turn over to Mr. Korem. It includes dogs, horses, cattle, vehicles, tools, wine, kitchen appliances, and horse equipment.

[18] The Consent CRO dated 10 January 2012, as it regards division of property, is based on a statement filed by Mr. Korem (though that was not appended, nor tendered in the instant proceeding). At clause 22a. it states:

> "All matrimonial property shall be transferred to Nahman Korem . . . including the matrimonial home located at 992 Westside Baddeck Road, all the assets of the Crown Jewel Resort Ranch, all assets of INK Real Estated and all the assets of Crown Jewel Aviation Ltd."

[19] In clause 22b. it declares the date of separation to be August 17, 2010. Clause 22c. speaks of "assets listed herein" but there is no list *per se* on the Order which was tendered before me. Under the arrangement Mr. Korem assumed all debts and liabilities.

[20] At clause 22e. the CRO states "Iris Kedmi shall have exclusive possession of the matrimonial home and the lot of land on which it sits". She is made responsible for upkeep of the property. There is nothing which appears to give Ms. Kedmi use of the furnishings and other chattels, this despite the fact that the Order is predicated on a shared parenting arrangement for their daughter Danielle who would continue to reside in the matrimonial home.

[21] It is possible, of course, to have co-existing property interests in a chattel. If there were proof that such an interest was given to (or retained by) Ms. Kedmi,

then conceivably the accused would be guilty of theft in respect to *everything* he removed from the house. He would then have deprived Ms. Kedmi of her "special property or interest in it", per s.322. However, I see nothing on the record which gives her any such proprietary interest in these chattels. And I see nothing which would restrict the accused from taking possession of them at any time. I say this realizing that the accused was subsequently found in contempt. The basis for that order was not made clear before me.

[22] The "amended Contempt Order" of December 18, 2013, tendered as Exhibit #15, gives the Sheriff the enforcement powers of an execution or recovery order. These Orders were meant to restore to Ms. Kedmi the property which the accused had removed from the matrimonial home. Sheriff's deputies, acting on these contempt orders, and in the company of Ms. Kedmi, seized and returned a host of items, which were catalogued and photographed. Exhibit #7 shows the items siezed at the house of Mary Doyle; Ex.#8 shows the items siezed from the Resort.

[23] It is possible that there are other proceedings, orders, filings, etc. which bear on the ownership of these assets (matrimonial, business, personal). I realize that Crown and Defence wanted to narrow the issues as much as possible and not burden this court with a review of the entire Family Division litigation. I am left to decide the case based upon what was put before me.

Theft and "Colour of Right"

[24] Relevant portions of s.322 of the Criminal Code read:

> (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything, whether animate or inanimate, with intent
>
> > (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
>
> (2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.
>
> (3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

The *actus reus* in this case is a physical "taking" of the property. In law, theft can be a temporary deprivation. The fact that items were returned to Ms. Kedmi after execution of the Family Division Contempt Order does not absolve the accused.

[25] The *mens rea* for theft includes intent in the usual sense. It seems it may also include willful blindness. In R. v. Hooyer 2016 ONCA 44 the Court appears to have endorsed the application of wilful blindness to a charge of theft, although it was careful to point out

> [20] Counsel for the appellant contends that these passages demonstrate the trial judge's error in law. He correctly points out that the mens rea for theft cannot be established based on what an accused "ought to have known": R. v. Briscoe, [2010] 1 S.C.R. 411

[26] In R. v. Briscoe [2010] 1 S.C.R. 411 the Supreme Court described willful blindness this way:

> 21 Wilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries. See *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, and *R. v. Jorgensen*, [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in *Jorgensen* (at para. 103), "[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?"
>
> 22 Courts and commentators have consistently emphasized that wilful blindness is distinct from recklessness. The emphasis bears repeating. As the Court explained in *Sansregret* (at p. 584):
>
> > (1) while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry <u>because he does not wish to know the truth. He would prefer to remain ignorant</u>. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault <u>in deliberately failing to</u> inquire when he knows there is reason for inquiry. [Emphasis added.]

> 23 It is important to keep the concepts of recklessness and wilful blindness separate. Glanville Williams explains the key restriction on the doctrine:
>
> > (2) The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in [page425] effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge. [Emphasis added.]
>
> 24 Professor Don Stuart makes the useful observation that the expression "deliberate ignorance" seems more descriptive than "wilful blindness", as it connotes "an actual process of suppressing a suspicion". Properly understood in this way, "the concept of wilful blindness is of narrow scope and involves no departure from the subjective focus on the workings of the accused's mind" (*Canadian Criminal Law: A Treatise* (5th ed. 2007), at p. 241). While a failure to inquire may be evidence of recklessness or criminal negligence, as for example, where a failure to inquire is a marked departure from the conduct expected of a reasonable person, wilful blindness is not simply a failure to inquire but, to repeat Professor Stuart's words, "deliberate ignorance".

[27] In this case Mr. Korem asserts a “colour of right”, as found in s.322, above.

This concept was explained in R. V. Dorosh, 2003 SKCA 134:

> 16 The jurisprudential history surrounding the phrase "colour of right" indicates that the meaning of the phrase has a certain quality of elusiveness (see The Law of Theft and Related Offences by Winifred

H. Holland (Toronto: Carswell, 1998) at pp. 150-170). The definition of the phrase by Martin J.A., speaking for the Court (including Gale C.J.O. and Estey J.A.), in R. v. DeMarco (1973), 13 C.C.C. (2d) 369 (Ont. C.A.) at 372 may be taken to have settled many, if not all, of the contentious issues raised by earlier Canadian cases where the phrase was considered. He said:

> The term "colour of right" generally, although not exclusively, refers to a situation where there is an assertion of a proprietary or possessory right to the thing which is the subject-matter of the alleged theft. One who is honestly asserting what he believes to be an honest claim cannot be said to act "without colour of right", even though it may be unfounded in law or in fact: see R. v. Howson, [1966] 3 C.C.C. 348, 55 D.L.R. (2d) 582, [1966] 2 O.R. 63. The term "colour of right" is also used to denote an honest belief in a state of facts which, if it actually existed would at law justify or excuse the act done: R. v. Howson. The term when used in the latter sense is merely a particular application of the doctrine of mistake of fact.

17 Since DeMarco was decided, the Supreme Court of Canada has dealt with the "colour of right" issue in two cases: R. v. Lilly, [1983] 1 S.C.R. 794; and R. v. Jones, [1991] 3 S.C.R. 110. Nothing said in the judgments in either of those cases in any way detracts from Martin J.A.'s definition. If anything, the Court's decision in Lilly may be said to impliedly support the definition. In two other cases, R. v. Lafrance, [1975] 1 S.C.R. 201 and R. v. Milne, [1992] 1 S.C.R. 697 the "colour of right" issue arose only incidentally and not as a principal issue. These judgments as well contain nothing that detracts from the DeMarco definition.

18 A colour of right can have its basis in either a mistake of civil law (a colour of right provides an exception to s. 19 of the Code; see: The Law of Theft and Related Offences p. 153) or in a mistake in a state of facts. The mistake in each case must give rise to either an honest belief in a proprietary or possessory right to the thing which is the subject matter of the alleged theft or an honest belief in the state of facts which if it actually existed would at law justify or excuse the act done.

> 21 Even if it can be said that the judge did not reject the first basis - a mistake in civil law - as a basis for colour of right, then he clearly erred in applying to the facts of this case the law embraced by a properly defined colour of right concept. I say that for these reasons: The judge appears to have acknowledged that the defendant had a belief he had a claim to the trailer. But, instead of asking himself: Did the defendant have an honest belief in his claim even though the claim may be unfounded in law and in fact? the judge, in effect, asked himself the question: Was the defendant's claim unfounded in law? The judge then proceeded to answer the latter question in the negative and on that premise concluded the defendant had no colour of right.

[28] To prove the *mens rea* for theft the Crown must negate, to the criminal standard, the existence of any colour of right. One may find an analogy with a charge of assault which is defined: "a person commits an assault when without the consent of another person he applies force . . ." In assault trials the Crown must prove the absence of consent beyond a reasonable doubt. Theft is defined as "every one commits theft who . . . without colour of right takes . . ." Similarly, in a trial for theft, the Crown must prove the absence of "colour of right" beyond a reasonable doubt.

[29] In the case before me the accused did not simply have a belief to sole ownership of whatever was a matrimonial asset – by virtue of the Family Division orders he did, in law, own the "matrimonial assets" and Ms. Kedmi did not. However, the orders, so far as I know, did not determine specifically what fell into

this category. The Consent Corollory Relief Order (CRO), as tendered here at trial, does not delineate what the matrimonial assets are, or what may fall within the exceptions in s.4(1) of the Matrimonial Property Act. (The only order which does is the first, of November 8, 2011, to which is appended a detailed list of items. However this order speaks only to assets then associated with the Resort and is only marginally relevant to the charges here.)

[30] The accused testified that he "knew it would come to this" – that there would be an allegation of theft – and hence was very careful to take only what had been awarded to him. In a statement to police he said "I try all the time to stay clean . . . to keep a clean slate in terms of definitely criminal. . . I am very, very careful" and "had I thought about any criminal risk I wouldn't have done it."

[31] Before taking the personal property out of the house the accused consulted with the local RCMP and with a lawyer. He had discussed the meaning of the CRO with his counsel during the divorce proceeding. However this advice was not given in regard to specific items which may have been in the residence in May of 2013. The CRO, and legal advice regarding it, leaves open the question what, among the contents of the residence in May of 2013, was or was not "matrimonial property". The legal advice he received was not as specific or germane as the legal advice received by the accused in R. v. Hudson 2014 BCCA 87 (see par. 27).

[32] Crown acknowledges that many of the items were indeed "matrimonial assets" in which the accused had a valid colour of right. But Crown also contends that the accused was constructing a case for plausible deniability of guilt respecting other items in which he had no such right.

[33] The accused made no attempt to hide his actions from anyone besides Ms. Kedmi. Theft may be committed without concealment, of course, but Crown also contends that the manner in which he carried out his plan was an attempt to create an appearance of bona fides, rather than an exercise in *bona fides* itself.

[34] The question for me is whether the Crown has proven beyond a reasonable doubt that that the accused had no colour of right in the particular items which form the subject of the charge, i.e. that he could not have honestly believed that the subject items were part of what the Family Division had declared to be his. The accused stated at trial "as far as I know I made no mistake regarding the matrimonial property, except for the jars of oil." However if Mr. Korem is to be believed, he would have a colour of right defence even to the jars of oil, having "an honest belief in a state of facts which, if it actually existed would at law justify or excuse the act done".

[35] I should evaluate the *mens rea* as of the time(s) he actually removed the items from the residence. Even if the accused meant to be scrupulous as he formulated his plan, did his mentality morph into something less honourable once he got into the residence - to willful blindness or outright dishonesty? If either of these was his mindset, then this, to my mind, is fatal to the element of "honest belief" which must sustain a colour of right defence. Although I have not found or been referred to a case considering the interplay between colour of right and wilful blindness, it seems to me that the latter is fatal to the former. An honest belief cannot form within a mindset of wilful blindness. When a person is willfully blind to a given state of affairs he or she cannot later claim mistake, or colour of right.

[36] The accused is not charged with being callous or cruel. There is no law against that. However the mutual animosity between the parties is a surrounding circumstance when considering motive, *mens rea* and colour of right as of the date of the alleged offences, and when assessing credibility as of the time of the trial.

Determination of "Matrimonial Property" / Jurisdiction

[37] Subsections (a), (d) (e) and (g) of s.4(1) of the Matrimonial Property Act of Nova Scotia read:

> 4 (1) In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of
>
> (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
>
> (d) reasonable personal effects of one spouse;
>
> (e) business assets;
>
> (g) real and personal property acquired after separation unless the spouses resume cohabitation.

[38] Not all property of both partners to a marriage is, in law, “matrimonial” property. The accused understood and acknowledged that property acquired after separation is not and could not be a matrimonial asset. The accused does not assert any colour of right to such. At trial the accused said “what she purchased after the separation is hers, very simple.”

[39] As noted above, the Family Division (so far as I know) did not decide what was a matrimonial asset on an item-by-item basis. It made one all-encompassing order, leaving the question of what exactly fell within that category unanswered. In a sense, the parties were left to their own beliefs as to what was a matrimonial asset.

[40] What constitutes “reasonable personal effects” will depend on the nature and history of the relationship, mutual understandings and individual circumstances. This court is not well-positioned to make such a determination. Although I have learned something about this marriage, there is much that I do not know. Not only do I have incomplete knowledge of relevant facts, I have little acquaintance with the jurisprudence which informs matrimonial property issues such as this.

[41] Defense submits that this court is not merely at a disadvantage in assessing the matter. Defence has submitted that this court has no jurisdiction to deal with matrimonial property. This is correct to the extent that I have no power to divide or award property. However, as much as I may wish it were not so, it seems I must recognize the Matrimonial Property Act of Nova Scotia as pertinent law and consider how it may operate on the questions of ownership, colour of right, etc. The fact that a given item of property may be subject to an order issued by a superior court under the Matrimonial Property Act does not exempt it from criminal proceedings.

[42] That said, theft charges are seldom seen where the property is held within a marriage. Who owns what in a family situation, where uses and interests are pooled, is often unclear. Criminal law cannot presume, in advance, who will be awarded ownership of property. Entitlement and claim to assets within a marriage

is often uncertain and may require determination by a court of competent jurisdiction. I am very wary about categorizing property according to the Matrimonial Property Act. Beyond this, I should not conflate what I might think about the application of s.4(1) to a particular item with the accused's belief in how it might apply, for that is the basis of his colour of right defence.

[43] Defence takes the position that since Mr. Korem was entitled to the "matrimonial property" under the Corollary Relief Order, any item removed from the premises which falls into that category cannot possibly sustain a charge of theft. It says that if the nature of the asset is disputed, i.e. if there is genuine disagreement whether any particular item fell into the category of "matrimonial property", only a Supreme Court judge can make the necessary determination.

[44] Must a superior court, which is vested with jurisdiction to divide assets, make a legal determination of whether the subject property is a matrimonial asset (or not) before this court can consider matters of ownership, interest, and deprivation under s.322 of the Criminal Code? If the answer is yes, does it follow that a person is immune to a criminal charge of stealing from his/her spouse unless and until a superior court rules on the nature of the asset under applicable matrimonial property legislation? (The Criminal Code once dealt specifically with

theft between spouses - s.329 was repealed in 2000, but it would not have provided much assistance on the facts of this case.)

[45] I am not being asked to divide assets. I am not even being asked to make a legal determination of what is or is not a matrimonial asset for the purposes of this criminal trial. I am conducting a criminal trial on a charge of theft in circumstances where the accused, as an ex-spouse of the complainant, claims to have an interest in the subject property pursuant to the matrimonial property legislation of the province. I am required to consider whether the accused honestly believed that the items he took were matrimonial assets awarded to him by the Family Division. It is the accused's belief which is germane to *mens rea* and colour of right.

[46] With respect to articles acquired by Ms. Kedmi before and during the marriage, the accused claims that most became matrimonial assets under s.4(1)(a), above. For instance, one item allegedly stolen was a photograph of Ms. Kedmi with her daughter Sharon. The accused became Sharon's step-father. He says that this became "part of my life". As I have said the accused is not charged with being cold-hearted and so the question remains whether he may have held a *bona fide* belief that such were among the "matrimonial assets" awarded to him by the court. A court of competent jurisdiction may decide that a photograph of Ms. Kedmi with

her grandmother is a "reasonable personal effect" of hers, but the question before me is whether the Crown has proven beyond a reasonable doubt that the accused had no *bona fide* belief that it was one of the "matrimonial assets" which had been awarded to him.

The accused's actions on the "between dates"

[47] On various occasions between May 1st and 9th of 2013 the accused went to the matrimonial home to survey the contents and remove things. As owner of the house and matrimonial assets within, he considered that he had the right to enter and inspect the premises. Indeed, he said that he had done so at various times in the past. Here, he went with the additional purpose of taking possession of his chattels.

[48] The accused forewarned the RCMP in Baddeck that he was going to enter the premises and remove most of the contents. He says he received some legal advice beforehand and attempted to educate himself about his legal position vis-à-vis the contents of the home, as per the various court orders and relevant legislation. Afterwards, he emailed Ms. Kedmi to tell her what he had done. On some visits his daughter Danielle went with him. She was staying with the accused at the Resort while her mother was away, as she had many times before. She was

asked to remove whatever she wanted of her own belongings. The accused had help from Eric MacIsaac, a son of Dr. Doyle, who helped him load things on a truck.

[49] Pauline Diekelmann, a friend of the complainant, agreed to watch the house while Ms. Kedmi travelled abroad. When Ms. Diekelmann got word of the accused's actions she went to check on it. She took most of the photographs in Ex#3 which show the interior and remaining contents. She called the police. She returned in the days following. She said that locks she placed on the door were "taken away" and that things "kept disappearing".

[50] The accused left behind some items which were, in his mind, clearly personal to Ms. Kedmi, such as her clothing. He left a television on the wall, which he knew had been acquired by Ms. Kedmi after separation. He also left some things which he said were matrimonial in nature, but which he "had no use for".

[51] The police investigated the complaint and took a statement from the accused. In this interview he was quite candid about the fact that he entered the house and removed his "assets". He said he had not disposed of anything. He was

queried about a decision made in the Family Division in late June. He was not queried about any particular item.

The Complainant's Actions During Execution of the Contempt Order

[52] On January 10, 2014 Sheriff's deputies went to the two locations where the accused had taken "his things" – the Doyle residence and the Resort. They executed the Contempt Order in the company of Ms. Kedmi and her daughter Sharon. Presumably they were needed to help the deputies identify the items which were taken from the matrimonial residence, and so distinguish them from other articles at the two locations. They entered the Doyle residence despite the fact that nobody was home at the time. With Ms. Kedmi's assistance the deputies identified what was subject to the Order. They catalogued and photographed whatever they removed. Mary Doyle says that many of the articles removed from the house were neither Ms. Kedmi's nor Mr. Korem's, but hers.

The Recovered Items

[53] Articles which were returned to Ms. Kedmi by the Sheriff are pictured in two sets of photographs: Ex #7 being items located at the Doyle residence, Ex #8 being items located at the Resort. I will make brief comment on the evidence as it relates to some of these things.

Exhibit 7 – a photo catalogue of items retrieved from the Doyle residence.

[54] As tendered, this exhibit was a series of photographs, two per page. For easier reference I have myself numbered each photograph on Exhibit #7 sequentially, and refer to them by such numbers here. Many of the photos depict multiple items.

[55] Everything in Ex.#7 was recovered by the Sheriff's deputies under the Contempt Order because it was identified by Ms. Kedmi as having been removed from the residence by the accused.

[56] Anything *not* specifically noted below has been acknowledged by Ms. Kedmi to be a matrimonial asset, awarded to the accused by the Family Division orders, and hence not a subject of the theft charges.

1/2/3/40/41/42 –

(1) Ms. Kedmi identifies a bracelet of freshwater pearls which she bought in Connecticut – Dr. Doyle seems to refer to these as "beads", claims they are plastic, and are hers.

(2) Ms. Kedmi "clearly remembers" that the heart-shaped locket was acquired in Israel, probably as a gift from her father, something which she has had from "a long time ago" – Dr. Doyle says this item was given to her by a friend in Bedford, NS

(3) Dr. Doyle identifies the gold chain and a green chain with a leaf pendant as hers

(4) Ms. Kedmi says the earrings were purchased at a market in Halifax, after separation – Dr. Doyle says she bought them, one of several pair she purchased to use as gifts.

6/7 – Ms. Kedmi claims the wooden box was a gift from her sister after separation and that the round porcelain container was given to her by her father as a gift, after separation – Dr. Doyle says she has owned this container since she was in university at St. F.X.

10/17 – Ms. Kedmi says she acquired all or some of the items shown in these photos after separation

12/13 - A Hermes scarf with a horse motif – a very distinctive item – Ms. Kedmi says it was a gift to her from a friend while she and the accused were together and is worth over a thousand dollars – Dr. Doyle says she purchased the item in France as a souvenir when she was there with her ex-husband, that she had an interest in horses, that she paid $100 for it, describing the place where she bought it, etc.

18 – weights for exercising – Ms. Kedmi says they are hers, purchased both before and after separation – Dr. Doyle says they are part of a set accumulated by her daughter and son who are personal trainers

19 – glass-top table showing sailboat –Dr. Doyle says this was made for her by her sister-in-law and that it was returned to her by the Sheriff because (according to Dr. Doyle) he had personal knowledge of this - Ms. Kedmi,

while appearing to accept that the table is Dr. Doyle's, said she told the deputies it was hers because her daughter, also present in the Doyle residence during the recovery effort, convinced her that it belonged to her.

26 - The burl tables – also shown in Exhibit #9 – further comment below.

27/28/29 – Ms. Kedmi says these wooden tables were given to her by her father before she marriage.

38 - The clay plate, according to Ms. Kedmi, was given to her before she was married

Exhibit 8 – a photo catalogue of items retrieved from the Resort

[57] As tendered, this exhibit was a series of photographs, two per page. For easier reference I have myself numbered each photograph on the Exhibit sequentially and refer to them by such numbers here. Many of the photos depict multiple items.

[58] Everything in Ex.#8 was recovered by the Sheriff's deputies under the Contempt Order because it was identified by Ms. Kedmi as having been removed from the residence by the accused.

[59] Anything *not* specifically noted below has been acknowledged by Ms. Kedmi to be a matrimonial asset, awarded to the accused by the Family Division orders, and hence not a subject of the theft charges.

1/2 - Photographs of Sharon, Ms. Kedmi's daughter (the accused's step-daughter) as a young child, and a painting she did for her mother as a child

8 – Ms. Kedmi says these were her exercise items

9/10 - Clothing – Sharon's, according to Ms. Kedmi

16 - Quilts made by Ms. Kedmi before separation

19 – Sunglasses which Ms. Kedmi says are hers – the accused calls them unisex

20 - Bag made by Ms Kedmi in her quilting group

23/24/25 - Ms. Kedmi's craft accessories, knee pads and knitting material

28 - Envelope – possibly empty, addressed to Iris Kedmi at 992 Westside Baddeck Rd. – the accused says that it is the contents that matter, and that he would have opened it to check

29 - Photos from Ms. Kedmi's first marriage

36/38 - Menorah – Ms. Kedmi says this was given to her by her grandmother; that "usually females light candles on the Jewish Sabbath, and I did"

40 - Porcelain houses which Ms. Kedmi says were hers

45 - Conch shell – Ms. Kedmi says this was a gift from Pauline Diekelmann after separation – the accused says he "saw it in the house before separation"

47 – Ms. Kedmi says this is "some of my hand-made stuff"

53/63 - Items Ms. Kedmi says she acquired before their marriage

58 - Photo of Ms. Kedmi with her grandmother – The accused says "it does have something to do with me"

59/60 - Collections of Ms. Kedmi's or items she made

69 - A cutter, used in rug-hooking, a hobby of Ms. Kedmi's

70 – Ms. Kedmi says this is a large block of soap she made after separation – The accused says Ms. Kedmi made such products during their marriage, and that he remembered this one, that "it just wasn't cut up and used"

76 - Graduation photo of Ms. Kedmi

78 - A large aloe vera plant in a clay pot – Ms. Kedmi says it was a gift to her by Ms. Diekelmann after separation – The accused says they had this before separation – Ms. Diekelmann did not speak to it

87/89/90 - Electric keyboard – Ms. Kedmi says this is from her first marriage

102 - A cd player – Ms. Kedmi says she purchased this after separation – the accused says it was purchased before

104 - iHome radio – Ms. Kedmi says was Sharon's – the accused says he used it with his iPhone

105 - Pliers – Ms. Kedmi says she used these to make jewelry

Applying the Law to the Subject-Matter of the Charges

[60] According to *Dorosh*, at par. 21, the question I must ask myself is this: "Did the defendant have an honest belief in his claim even though the claim may be unfounded in law and in fact?" It would seem that the Crown must negate such state of mind to the criminal standard of proof. Wilful blindness is inconsistent with the *bona fides* which must accompany a "colour of right" defence.

[61] The definitional distinction between matrimonial assets and personal effects suggests that a line can be drawn between them, but the distinction depends on the

meaning of "reasonable" in s.4(1) (d) of the MPA. This in turn depends on the circumstances of the marriage, the source of the article (or the funds to purchase it), the use to which it was put, the nature of the relationship, etc. Ultimately a court may have to draw this line. The accused and the complainant differ in their views. As this is a criminal trial of the accused, I must ask whether there is a reasonable possibility that he held an honest belief that a particular item was a matrimonial asset. If so, it follows that he believed he was entitled to it pursuant the Consent CRO, Ex#2. I make this determination having less evidence before me than might normally be heard in a family law proceeding where the assets were being divided.

[62] The menorah may serve as an example. Although this is undoubtedly a family heirloom of Ms. Kedmi's, given by her grandmother, is there no possibility that it became a matrimonial asset? They celebrated the Sabbath together. Although it seems mean-spirited of the accused to have taken it, he is not on trial for lacking sympathy. Photographs of Ms. Kedmi with her family could be viewed in the same way.

[63] In a similar vein, various crafts made by Ms. Kedmi, and the tools used to make them, probably meant more to her than to the accused. But the accused may have derived some benefit or enjoyment, considered that these were a part of his

married life, and have believed that they therefore were matrimonial assets. The same might be said of various "collections" of Ms. Kedmi's.

[64] The accused acknowledges that property acquired after separation cannot be a matrimonial asset under s.4(1), given that they never resumed cohabitation. However, if the accused honestly believed that a particular item was acquired prior to separation (even though in fact it was acquired after) he would have a defence to a charge of stealing that item.

[65] The miniature bicycle in photo 17 or the print in photo 10 (see Ex.#7) may serve as examples here. Even assuming Ms. Kedmi is truthful in saying she bought these after separation, if there is a reasonable possibility that the accused believed these were household effects before separation, he has a mistake of fact defence to a charge of stealing them.

[66] Among the items allegedly stolen is a printer. This was acquired by Ms. Kedmi after separation, and taken by the accused in May of 2013, but the accused may have a different sort of colour of right defence here. The Order of 8 November 2011 declares "all assets of Crown Jewel Resort" to be matrimonial assets. The receipt from Connors Office Supplies, Ex. #10 shows a shipping date of November 18, 2010. The business was still operating. Although Ms. Kedmi

conducted the transaction with Connors, the accused may well have believed that ownership vested in him.

The Golf Clubs

[67] Ms. Kedmi says that a set of golf clubs was taken and never recovered. Lennon MacIsaac testified that in March of 2013 he purchased a set of golf clubs from a lady in Halifax and left them at Ms. Kedmi's home in Big Baddeck. It appears they were gifted to Ms. Kedmi. He said that he left his own set of clubs – "my clubs" - at the clubhouse at Bell Bay. Danielle testified that on a visit to the house with the accused about a week after Ms. Kedmi left the country, she told her father that "Lenny owned the golf clubs." She says that she saw the clubs being loaded on the truck, in the presence of Eric MacIsaac, taken away, and put in the basement of the resort, only to disappear within a couple of days. Eric MacIsaac denies ever having seen golf clubs. Dr. Doyle does not remember seeing golf clubs at the Resort in the following days.

[68] Despite concerns which arise about exaggeration in Danielle's evidence, and although I regard Eric MacIsaac as an honest witness, the evidence of Danielle and Lennon MacIsaac are worthy of weight. The accused could easily have removed the clubs without Eric MacIsaac's knowledge.

Landscaping Equipment

[69] Lennon MacIsaac says he left a scythe and whipper-snipper and cut-off saw at the house. In cross-examination he said he received a Honda trimmer from Ms. Kedmi, which he fixed. The Order of November 8, 2011 lists two "string trimmers" among the items that the accused was awarded. The evidence is not sufficiently clear that Ms. Kedmi or Mr. MacIsaac had a proprietary interest in any such item. With respect to the scythe, Mr. MacIsaac was directed to photo 22 in Ex#3 and Ex#11 and said that a handle showing there "could be" the handle of his scythe, sowing doubt about whether it was taken at all. With respect to the saw the accused simply denies ever taking it. Nobody corroborates Mr. MacIsaac on this point.

Jewelry

[70] In her direct testimony, Ms. Kedmi gave an itemized description of jewelry which she alleges was taken from the house and which she valued at between fifty and sixty thousand dollars. She appeared to refer to a list which she'd prepared, and there was some suggestion that this had been used as an exhibit in a family proceeding. However no such list was tendered in this trial, and I am not aware that any formal ruling was made on whether such assets, if they were deemed to actually exist, were personal or matrimonial.

[71] The accused denies that Ms. Kedmi had jewelry of such value. Ms. Kedmi said she worked during the term of the marriage, and had gifts of money from her family.

[72] After a third-party records application I ordered production of a statement of assets filed by Ms. Kedmi in a personal bankruptcy proceeding which she commenced shortly after the removal of assets from the house. The statement itself was filed in August of 2013; it lists nothing for personal assets. When cross-examined she also said it was "correct" that she told the Trustee in May of 2013 that, with respect to the home, "content removed by spouse and under dispute pending settlement." She told defence counsel that she did not mention the jewelry

here “because it was not with me”. But why would she not mention it along with the contents which she *did* say were “removed . . . pending settlement”? Full and frank disclosure would have included something about $60,000 of jewelry. She was vague on whether she told the Trustee that she recovered many of these contents in January of 2014. I am left with concerns about the veracity of her evidence about the jewelry. It also seems odd that she would leave such portable, valuable items in the home, given the state of the relationship, knowing that the accused had ready access to the premises. If she ever had such items, it seems possible that she still may.

Bee Happy farms

[73] Legally there appears to be no distinction between “Bee Happy Farms” property and personal property of Ms. Kedmi. The accused acknowledged that Ms. Kedmi ran such a business, after separation, but I have no evidence of incorporation. None the less, business people generally keep books and records.

[74] Ms. Kedmi says that scales were taken from the house, and other items connected to this enterprise, because the accused “was trying to destroy my business”. For such assets, Ms. Kedmi did not produce a single record of purchase. There appears to be an interest in honey-making which goes back before 2011 –

the Nov. 8, 2011 order includes a sieve and beeswax among items to be returned to the accused.

[75] The one thing for which I have cogent evidence is the oil in the fridge. Ms. Kedmi says these were infused oils; the accused says he thought they were cooking oils and took them so they would not spoil. He could hardly claim that they'd been in the fridge since August of 2011. He says he took steps to preserve such items. He claims to have told police that if something did not belong to him "it could be returned" but that Ms. Kedmi "did not tell him at any time she wanted it." This is hard to square with the fact that she obtained a contempt order authorizing the Sheriff to seize and return everything which was taken. This seems to show that she "wanted it" very much.

Two "burl" Tables

[76] The accused says that these were matrimonial assets. Even though delivery was taken at the house well after he and Ms. Kedmi had parted company, he claims that they were paid for in July or August, "just before the separation". He says that Todd Rudderham, who built and sold the tables, had been employed on a cash basis around the resort and the house. Noting that the wood for the tables had been cut in spring, and that the process of curing the wood took a number of months,

and given that Ms. Kedmi wanted to improve the look of the house, he says they paid for the tables in advance.

[77] I am highly suspect of this evidence. It seems very unlikely that at a time when the marriage was in jeopardy, having known Mr. Rudderham for only three to four months, not knowing how the tables might turn out, without any real assurance that he would even complete them, that the accused would agree to such an arrangement. That he would place this level of trust in Mr. Rudderham, in his workmanship, financial stability and personal integrity, knowing so little about him, given that he had no professional credentials, is difficult to believe.

[78] Here willful blindness may come into play. The accused may have paid Todd Rudderham cash for work around the premises, but it is not a mistake of fact to later make oneself believe that these tables were subsumed in such cash payments.

[79] I should note that I am dubious about the authenticity of the receipts which Ms. Kedmi produced, Ex#4 and Ex#5. Although Ms. Kedmi says she received them from Todd Rudderham when the tables were purchased, she did not produce them at a Family Division proceeding where these tables were in dispute “because

she wasn't asked to". It seems more likely that these receipts were produced well after the fact, for the purposes of this criminal trial.

[80] It seems unlikely that Todd Rudderham would give, or they request, receipts, given that he was not a professional, and was seemingly working for them on a cash basis. Ironically, one might expect Mr. Korem or Ms. Kedmi to ask for a receipt if Mr. Rudderham *were* being paid in advance, as the accused claims.

[81] Although some portions of Pauline Diekelmann's evidence about the purchase of the tables are hearsay and of no weight, she never the less had personal familiarity with Mr. Rudderham and some direct knowledge of the tables, which were made on her property. Her evidence offers some support for Ms. Kedmi's assertion that she ordered the tables from Mr. Rudderham after separation.

[82] Danielle's evidence about the tables is clearly erroneous.

The Conch Shell

[83] I have noted above that both the complainant and Ms Diekelmann testified that this was a personal gift, after the parties separated. It is distinctive and difficult to mis-take.

Credibility Generally

[84] The strong animosity between the complainant and the accused is an obvious concern. It is something which had the potential to affect both their actions and their testimony.

Credibility of the complainant

[85] Under the heading “jewelry”, above, I note credibility concerns which arise out of statements made to a Trustee in bankruptcy.

[86] At Ms. Kedmi’s direction the Sheriff deputies removed a very distinctive glass-top table from the Doyle residence. This was soon afterwards acknowledged to be Dr. Doyle’s (as she has testified) and returned to her. In explanation Ms. Kedmi says that her daughter Sharon convinced her that she owned it, and so she took it. This is highly improbable, given her professed familiarity with the multiplicity of other items catalogued in these proceedings. This does not mean that she is untruthful about every item, but it makes one think that she may be untruthful about some.

[87] Lastly, I note above at para. 56 *et seq* many instances where Mary Doyle states, clearly and unequivocally, that certain items are hers. This casts doubt on Ms. Kedmi's claims of ownership, and weakens her credibility generally.

Credibility of the Accused

[88] The accused said he removed the things from the house when the complainant was away because (1) she would cause an uproar, or even act with violence, if she were present and (2) the bank was about to foreclose on the house, putting his things (the contents) in jeopardy. I am very dubious about this second pretext.

[89] First, I note that when he gave his statement to the RCMP on July 10, 2013, at which time Ms. Kedmi was still occupying the house, he says, at line 336: "it's just a matter of days before the Bank is going to foreclose, change the locks and everything the house goes." This goes to the reasonableness and honesty of his belief that this step was imminent in May, when he emptied it of the "matrimonial assets".

[90] At line 343 of the statement the accused says "The bank comes and changes the locks and I lose this stuff." At line 280 *et seq* he says that then "the bank owns

it" (the house) and he has no right to access it. He says that Ms. Kedmi would have to come to an arrangement with the bank in order for her to attend there.

[91] It is difficult to credit the accused with the belief that he would lose the contents of the home in the event of foreclosure. There was no mention of any chattel mortgage. A standard residential mortgage does not create a lien on the contents of a home. His assertion that he removed the contents because he would lose them to foreclosure seems disingenuous.

[92] In his statement the accused speaks to Cst. Stanley about correspondence he sent to Justice MacAdam to advise of the bank foreclosure, a fact he says the Justice was not aware of. At line 403 Cst. Stanley says "So he, the justice will review your letter with the circumstances surrounding your foreclosure where if those items do get put back they are basically just going to be forgotten", to which the accused responds "Or they will be removed by Ms. Kedmi to another place. That's another possibility." This appears to run counter to his stated belief that the bank foreclosure spelled the end of the personal assets. Here he says that *after* the bank has taken control of the house Ms. Kedmi *would* be able to remove them. If she were able to do so, why not he? Why then the urgency to remove the personal property in May?

[93] The accused claims he would lose the right to enter the house – "bank would change locks and that's it" – but this doesn't equate to loss of the personal property. Why would Mr. Korem believe that personal property inside the dwelling would suffer damage simply because the bank took ownership of the real property and put its own locks on the door? It would have a duty to protect and account for such items.

[94] If, indeed, he believed that the bank would have the right to repossess the contents of the home, matrimonial or otherwise, i.e. that he and Ms. Kedmi had pledged these assets as well as the land and building to the bank in return for funds, his action in removing this encumbered property, on the very verge of a foreclosure, is an action which smacks of fraud in and of itself.

Credibility of Danielle

[95] At the time of trial, Danielle was estranged from her father. She referred to him by his first name. I approach her testimony with caution, given the favoritism she clearly displays towards the complainant.

Credibility of Lenny MacIsaac

[96] Mr. MacIsaac, I am sure, is sympathetic to Ms. Kedmi's plight and would hope that her position in this proceeding would prevail. At the same time I saw no indication that he was being untruthful and heard nothing inherently implausible or contradictory.

Credibility of Mary Doyle

[97] Dr. Doyle appeared to be honest and truthful in her testimony, showing no signs of avoidance, embarrassment, prevarication, contrivance or confusion. Her testimony and that of Ms. Kedmi is often at odds, but it is the latter whose credibility suffers as a result.

Credibility of Pauline Diekelmann

[98] Ms. Diekelmann presented as honest and straightforward, self-possessed, with good recall. Although a friend of Ms. Kedmi throughout this entire affair she did not appear partisan in the sense of shading her evidence. She said she had "no relationship with Mr. Korem . . . good or bad."

Credibility of Eric MacIsaac

[99] Mr. MacIsaac seemed honest and forthright but could not be taken to know of every single thing which the accused removed from the house.

Findings

[100] I find that the accused has committed theft in respect to the following things: the golf clubs, the jars of oil (infusions) in the fridge, the burl tables, and the conch shell, and I find him guilty on count 3 in the Information. Because the value is not proven to exceed five thousand dollars he is found guilty of theft under that amount, per s.334(b).

[101] Because Bee Happy Farms is not legally distinct from Ms. Kedmi, a finding of not guilty enters on count 4 because it is duplicitous. The jars of oil were taken with the other things, part of one delict.

[102] Because the golf clubs had apparently been given to Ms. Kedmi, a finding of not guilty enters on count 2. They are included with the theft of items in count 3.

[103] With respect to all the remaining "personal belongings, jewelry, furnishings, household items" either (1) it is not proven to the criminal standard that the complainant had the requisite property interest, or (2) I cannot discount the

possibility (though in some instances a slight one) that the accused had an honest belief that a given item was his property or (3) I cannot be sure that a given item was in the house, or if it was that the accused took it.

Dated at Sydney, N.S. this 11th day of July, 2017.

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A. Peter Ross, JPC